85-1359

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C.L. NORVELL, Sheriff, St. Lucie Jail, DR. BARBARA GREADINGTON, Commissioner, FPPE, and LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Petitioner,

vs.

RICHARD MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

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83 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES COURT OF APPEALS ERRED IN SUBSTITUTING ITS OWN INTERPRETATION OF A FLORIDA STATUTE FOR THAT OF THE FLORIDA SUPREME COURT, WHO HAS THE FINAL AUTHORITY TO INTERPRET THE STATE'S LEGISLATION, AFTER HOLDING THAT A FEDERAL HABEAS CORPUS COURT OWES NO DEFERENCE TO THE STATE COURT'S INTERPRETATION OF ITS OWN STATE STATUTE?

II

WHETHER THE UNITED STATES COURT OF APPEALS INCORRECTLY HELD §713.34(3) FLORIDA STATUTES UNCONSTITUTIONAL ON THE BASIS THAT TO DO OTHERWISE WOULD CREATE THE ANOMALOUS SITUATION OF HOLDING THE STATUTE CONSTITUTIONAL, ALTHOUGH THE JURY INSTRUCTIONS THAT ARE A VERBATIME RENDITION OF THE STATUTE ARE HELD TO BE CONSTITUTIONAL?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
GROUND UPON WHICH JURISDICTION IS INVOKED	1-2
FLORIDA STATUTE INVOLVED	2
STATEMENT OF THE CASE	2-16
REASONS FOR GRANTING THE WRIT	16-32
CONCLUSION	32-33

TABLES OF AUTHORITIES

	PAGE
Bank of Heflin v. Miles, 621 F.2d 567(5th Cir. 1980)	20
Barnes v. U.S., 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed2d 380 (1973)	31
Cotton States Mutual Insurance v. Anderson 749 F.2d 663, 667 (11th Cir. 1984)	19
Ferguson v. Estelle, 718 F.2d 730, 733(5th Cir. 1983)	19
Fowler v. Cross, 635 F.2d 476 (5th Cir. 1981)	19, 20
Francis v. Franklin, U.S. , 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)	21, 22, 23, 24, 25, 27
Harris v. Conradi, 675 F.2d 1212(11th Cir. 1982)	19
Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), cert. denied 444 U.S. 885, 200 S.Ct. 175, 62 L.Ed.2d 114(1979)	20
Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978)	18, 19

	PAGE
Miller v. Norvell, et al., __F.2d__ (11th Cir. 1985)	
Miller v. State, 407 So.2d 959(Fla. 4th DCA 1981)	14
Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39(1979)	18, 22, 23, 24, 25
Schad v. Burough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)	18
State v. Chambers, 709P.2d 321(Utah 1985)	23, 24
State of Florida v. Ferrari, 398 So.2d 804 (Fla. 1981)	15, 16, 21
Welton v. Nix, 719 F.2d 969, 970 (8th Cir. 1983)	19
OTHER AUTHORITIES:	
§713.34(3) Fla. Stat.(1979)	1, 2, 3, 15, 16, 17, 21, 33
23 Fla. Jur. 2d 38 Evidence and Witnesses §9	32

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, was issued on November 15, 1985; that court denied rehearing and rehearing En Banc on December 16, 1985. Miller v. Norvell, et al., ___F.2d___(11th Cir. 1985). The opinion is reproduced in the Petitioner's Appendix at A1-A.

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals, Eleventh Circuit was rendered on November 15, 1985, reversing the district court's denial of Respondent's Petition for Writ of Habeas Corpus (A 1). That court denied a timely motion for rehearing and En Banc consideration on December 16, 1985 (A 2) The jurisdiction of this Honorable Court is invoked

pursuant to the specific provisions of 28 U.S.C. §1254(1).

FLORIDA STATUTE INVOLVED

Section 713.34(3) Florida Statutes (1979) provides as follows:

> (3) Any person, firm, corporation or agent, officer or employee thereof who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for this specific improvement, while any amount for which he may or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state; provided, however, that failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud.

STATEMENT OF THE CASE

Respondent, Richard Miller, was a building contractor in Florida, who was charged by Information with seven counts of misapplication of funds in violation

of §713.34 Florida Statutes (1979). The State of Florida nolle prossed counts VI and VII of the Information on March 24, 1980.

Respondent before trial filed a motion to dismiss alleging §713.34(3) Fla. Stat. to be unconstitutional both as written and as applied to him stating the statute violates both the United States Constitution and the Florida Constitution. That motion to dismiss was denied by the trial court on March 21, 1980.

Respondent was tried on those charges March 23-28, 1980. The essential facts in the case are as follows:

In 1979 five persons (William Sbariscia, Lillian Lotsof, Lillian Banke, Earl Vogt, and Anna Fesh) individually entered into separate contracts with Respondent for the construction of a

home for each of them(*Tr. 42-44, 195, 147-148, 248, 251). At trial each of the five would-be homeowners testified that the respective contract called for a downpayment in order that building of the home could begin; each person gave Respondent the necessary down-payment (Tr. 45, 71, 84; 89-90; 148; 251-255). The Sbariscia lot, the Banke lot and the Vogt lot, were cleared and fill dirt was placed on the lots (Tr. 47-48; 95; 100; 155). The three witnesses testified nothing further was done in the way of building the respective home (Tr. 47; 94; 155). In contrast, however, the Lotsof's home and the Fesh's home progressed a little further in construction. Ms. Lotsof testified by the end of July most of the work was completed on the

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* The symbol "Tr" followed by a page number will be used to refer to the testimony as it appears in the trial transcript of this cause.

house (Tr. 212). Ms. Fesh testified she made all payments on the home through August 24, 1979, which was the last check given to Respondent (Tr. 255). Ms. Fesh further stated she did not give Respondent all the payments the contract called for; the last payment was withheld because Respondent was not working on the house anymore (Tr. 255-256).

William Sbariscia testified Respondent advised him the house would be completed, except for finishing touches, by the time he left on vacation (Tr. 110-111). Respondent left for vacation on June, 1979, but the home was not even begun (Tr. 109). Sbariscia further said Respondent would hurry him off the phone telling him to call Clyde Richner whom Respondent left in charge while Respondent was on vacation (Tr. 111). Richner was left with no funds to

continue with any construction (Tr. 112) and no work was done on the Sbariscia property while Respondent was on vacation. (Tr. 112). Respondent never attempted to complete the house (Tr. 50). Respondent refused to agree to meet with Sbariscia and come up with a building schedule. (Tr. 77). Respondent never told Sbariscia that he had a problem getting sub-contractors. (Tr. 136). Respondent also requested that Sbariscia not have an attorney to look over the contract. (Tr. 45, 46). Ms. Lotsof testified that by the end of July most of the work was completed on the house (Tr. 212), but in the meantime she was getting Notices to Owner, and liens were being placed on the property from suppliers and sub-contractors (Tr. 200). Respondent always told Lotsof there was nothing to worry about with respect to

the payment of sub-contractos, that by the time the house was built the claims would be satisfied. (Tr. 200, 214, 218). Lotsof had no indication funds were to be used for another purpose. (Tr. 218). When Respondent came back from vacation, he refused to finish the Lotsof's house. (Tr. 212, 233). It was clear that Respondent did not want to go through with the contract. (Tr. 233). Before the contract was signed, Lotsof wanted an attorney to look at the contract but Repondent said he would not build the house, if an attorney was involved. (Tr. 227).

Vogt testified that there was no indication that the $6,500 downpayment would be used for any other purpose other than for his house, otherwise, Vogt testified he would not have given Respondent the money. (Tr. 181). Vogt

found out Kelly Brothers was not paid and that a lien was filed against his property. (Tr. 166). Vogt demanded his money back but did not get a refund. (Tr. 164, 165). Respondent told Vogt that he was leaving on vacation on June, 1979. (Tr. 157-158). Respondent, when he left on vacation did not leave Clyde Richner, whom he left in charge, any funds to obtain the building permit for the Vogt residence. (Tr. 159).

Ms. Fesh testified she received liens against her property and notices of payments due. (R. 256-257, 259). Fesh asked Respondent about the liens and notices before giving him the last check. (Tr. 257). Fesh asked for an accounting but Respondent said it would take too much time away from building the house. (Tr. 257). Fesh asked Respondent what he was doing with the

money and Respondent said it was none of her business. (Tr. 257-258, 273). Fesh testified that she gave Respondent the last payment she made because Respondent said he was going to pay the liens. (Tr. 258). Respondent told Fesh that the money was being used for her house. (Tr. 260-261). Fesh wound up paying half the liens herself. (Tr. 261). After the last payment was made, Respondent refused to do any more work on the house and refused to pay the bills. (Tr. 271). Respondent told the subcontractors to see Fesh for the money. (Tr. 289). When Fesh asked Respondent about the liens from Pan American Windows, Respondent said he was on his way to pay it off. (Tr. 256). Fesh wound up paying the lien. (Tr. 257). Mrs. Fesh questioned Respondent about delays before Respondent left for

vacation. (Tr. 258). Respondent stated that Fesh should not worry, that the house will get done. (Tr. 258-259). Fesh called Respondent up after the last payment was made. (Tr. 271). Respondent told Fesh not to bother him and that she was annoying him and then Respondent hung up on her. (Tr. 271).

Marvin Kelly, one of the sub-contractors, contacted Clyde Richner while Respondent was on vacation about paying some of the bills but Richner stated he had no funds. (Tr. 318-319).

Clyde Richner testified that Respondent knew before he went on vacation that people were owed money. (Tr. 449). Clyde Richner testified that Respondent did not leave him any money before leaving on vacation. (Tr. 385). Clyde Richner testified as to the problem of lining of sub-

contractors. Richner said that those sub-contractors refused to work because of fear of not being paid because they were already owed money on previous jobs. (Tr. 403-404, 410). Clyde Richner testified that Respondent bought a new Lincoln automobile before leaving on vacation. (Tr. 404).

Respondent took the stand on his own behalf and testified as follows:

As to Count I Respondent admitted that Kelly Brothers Tractor Service and Glenn's Trucking were not paid for the work they performed on the Sbariscia property. (Tr. 871-872). As to Count II it was admitted by Respondent that the following firms were not paid: Kelly Brothers Tractor Service, Glenn's Trucking, Burns Plumbing, Rinker Materials and Ace Roofing. (R. 871-872). As to Count III, Respondent admitted

Kelly Brothers Tractor Service and Glenn's Trucking were not paid. As to Count IV, Respondent admitted that Kelly Brothers Tractor Service had not been paid. (R. 871-872). As to Count V, Respondent admitted that the following companies were not paid; Kelly Brothers Tractor Service, Glenn's Trucking, L.S. Bush Company, Stuart Paint and Supply, Gause Electric Company, Pan American Aluminum Corporation, McCauley Construction Company and Westervelt Builders.

Respondent testified that the subcontractors and materialmen were not paid because there were contract disputes, and not out of any intent to defraud any one. Additionally Respondent stated the money received was placed into the Pointe South Builders Checking Account and used to pay bills as the corporation received them.

At the jury instructions conference the Respondent submitted certain requested jury instructions. After reviewing the requested jury instructions and hearing arguments from both counsels, the trial court determined the requested jury instructions were either covered by the general instructions, or that the wording proposed by Respondent did not fit within the circumstances of the statute under which Respondent was charged, the trial court denied the instructions as requested by Respondent. Respondent was found guilty of all five counts and was sentenced to six months in the County Jail with fourteen and one-half years on probation. Respondent appealed his conviction to the Fourth District Court of Appeal of Florida on March 19, 1981. In an opinion issued on December 9, 1981, that court affirmed the petitioner's

conviction. Miller v. State, 407 So.2d 959 (Fla. 4th DCA 1981).

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District on May 14, 1982. On January 14, 1985, United States Magistrate Jean Kyle in a written order recommended that the petition for writ of habeas corpus be denied. On February 8, 1985, U.S. District Judge Roettger approved and adopted the recommendation of the Magistrate and ordered that the petition for writ of habeas corpus be dismissed as being without merit.

Respondent filed his notice of appeal on February 21, 1985. Respondent then filed an application for certificate of probable cause to appeal, and an application for certificate to proceed in forma pauperis with affidavit in the

lower court. On April 30, 1985, Judge Roettger granted Respondent a certificate of probable cause to appeal. On November 15, 1985, the panel issued its opinion, authored by the Honorable Frank M. Johnson, holding that the language of §713.34(3) creates a mandatory presumption, therefore the Statute is unconstitutional both on its face and as applied to Appellant in the present case.

Petitioners seek to invoke the discretionary jurisdiction of this Court to review the decision of the Court of Appeals erroneously substituting its analysis of §713.34(3) Florida Statutes for the analysis and interpretation given to §713.34(3) by the Florida Supreme Court in State of Florida v. Ferrari, 398 So.2d 804 (Fla. 1981) (A 19 - A 36).

The Court of Appeals denied Petitioner's Motion To Stay Mandate (A 37-38) Petition To Stay Mandate was likewise denied by this Court. (A 39) The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court considered the constitutionality of §713.34(3) Florida Statutes in State v. Ferrari, 398 So.2d 804 (Fla. 1981). After conducting an analysis following the "rational connection" test, the Florida Supreme Court held the presumption of §713.34(3) to be permissive in nature, and found that since the requisite relationship between the proven and presumed facts existed, the presumption of §713.34(3) passes constitutional muster. (See A 27). The Court of Appeals in the instant case substituted its own

analysis for that of the Florida Supreme Court, concluded the presumption of §713.34(3) to be mandatory in nature, and held the Florida Statute unconstitutional (A-16). By the instant decision, the United States Court of Appeals, Eleventh Circuit, has decided a federal question in a way in conflict with a decision by the Florida Supreme Court, who has the final authority to interpret the State's legislation. For this reason this Court should accept jurisdiction.

A. WHETHER THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS OWN INTERPRETATION OF A FLORIDA STATUTE FOR THAT OF THE FLORIDA SUPREME COURT, WHO HAS THE FINAL AUTHORITY TO INTERPRET THE STATE'S LEGISLATION?

The Court of Appeals in its opinion states:

> Although the Florida Supreme Court held that the statute in issue, and therefore the jury instruction authorized by that statute, created a permissive inference, this Court owes no deference to that interpretation. (A 7).

It is settled law that the state courts have final authority to interpret that State's legislation. Further that it is not the function of the federal courts to construe a state statute contrary to the construction given by the highest court of the state, and once the state court has construed a statute, federal courts owe deference to the state court's interpretation and are bound by that construction. See, e.g.: Schad v. Burough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L.Ed.2d 671 (1981); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Landmark Commun-

ications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); Cotton States Mutual Insurance Company v. Anderson, 749 F.2d 663, 667(11th Cir. 1984) (Federal courts must be slow to declare state statutes unconstitutional, and are bound by the interpretation placed on the statute by the state court.); Welton v. Nix, 719 F.2d 969, 970(8th Cir. 1983) (Federal courts are obliged to accept the state courts interpretation, just as though it were written into the statute in so many words.); Ferguson v. Estelle, 718 F.2d 730, 733(5th Cir. 1983) (In evaluating the facial constitutuionality of a state statute, a federal court is bound by the constructions placed on that statute by state court decisions); Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982); Fowler

v. Cross, 635 F.2d 476 (5th Cir. 1981); Bank of Heflin v. Miles, 621 F.2d 567 (5th Cir. 1980).

The Fifth Circuit Court of Appeals in Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982), cert. denied 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114(1979) stated:

> "On rare occasions, [federal courts may] re-examine a state-court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal question!" Mullaney v. Wilbur, 421 U.S. 684, 691 n.11, 95 S.Ct. 1881, 1886 n.11, 44 L.Ed.2d 508, 615 n.11 (1975). Otherwise, "[s]tate courts are the ultimate expositors of their own state's laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a [s]tate's criminal statutes by the courts of that [s]tate...." Mendiola v. Estelle, 635 F.2d 487, 489 (5th Cir. 1981).

Id. at 1080. Petitioner submits that the Florida Supreme Court was not at-

tempting to evade consideration of a federal issue when it decided State v. Ferrari, supra; and that the construction of §713.34(3) Fla. Stat. as permissive rather than mandatory was arrived at following federal standards. Thus that interpretation was proper under federal law, was binding on the Circuit Court, and therefore, the Circuit Court erred in substituting its interpretation for that validly imposed on §713.34(3) by the Florida Supreme Court.

B. WHETHER THE COURT OF APPEALS INCORRECTLY HELD §713.34(3) UNCONSTITUTIONAL ON THE BASIS THAT TO DO OTHERWISE WOULD CREATE THE ANOMALOUS SITUATION OF HOLDING THE STATUTE CONSTITUTIONAL, ALTHOUGH THE JURY INSTRUCTIONS THAT ARE A VER BATIM RENDITION OF THE STATUTE ARE HELD TO BE CONSTITUTIONAL?

In the instant case, the Court of Appeals relying on Francis v. Franklin,

___U.S.___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) determined that because the jury instructions were found to be unconstitutional, then ipso facto the statute must also be held to be unconstitutional (A 15). Petitioners respectfully, point out that this Court's opinion in Francis v. Franklin, supra, was based entirely on the unconstitutionality of the jury instructions, without declaring the Georgia murder statute to be unconstitutional. The same result appears in Sandstrom v. Montana, supra. In a recent case, the Utah Supreme Court held that a jury instruction stating that possession of recently stolen property, unaccompanied by any satisfactory explanation of such possession, constitute "prima facie evidence" that the possessor stole the property created the sort of "rebutt-

able mandatory presumption" that the U. S. Supreme Court condemned in Francis, supra. However, the court upheld the statute from which the language of the instruction was drawn, UCA §76-6-402 (1) stating:

> "[T]he statute does not affect the jury's weighing of the evidence; rather, the statute provides a standard by which to determine the sufficiency of the evidence for submitting the case to the jury. The statute may properly be used to defeat a claim by a defendant that the State has, as a matter of law, failed to establish a prima facie case against the defendant."

State v. Chambers, 709P.2d 321(Utah 1985).

It is clear that this Court's decisions in Franklin, supra, and Sandstrom, supra, are limited to the jury instructions, and as to how specific (or lack of specificity) the jury

instructions were in instructing the jury as to the burden, if any, the statute placed on the defendant. The Supreme Court in Franklin, supra, 85 L.Ed. at 358-9 stated:

> Had the instruction "[a] person ...is presumed to intend the natural and probable consequences of his acts," App. 8a-9a, been followed by the instruction "this means that a person will not be presumed to act with criminal intention upon consideration but the jury may find criminal intention upon consideration of all circumstances connected with the act for which the accused is prosecuted." a somewhat stronger argument might be made that a reasonable juror could not have understood the challanged language as shifting the burden of persuasion to the defendant.
> Whether or not such explanatory language might have been sufficient, however, no such language is present in this jury charge....

The Supreme Court in Sandstrom, 442 US,

at 517, stated:

> [Petitioner's jury] were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of "some" evidence; nor even told that it could be rebutted at all....given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.

In the case at bar it is important to note first, that the jury was, in fact, instructed that the presumption could be rebutted:

> At trial, the judge instructed the jury: "Proof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is suffi-

> cient to establish a fact and which, if unrebutted, remains sufficient for that purpose."(A3-4)

Thus the case at bar could have been reviewed and decided solely on the specificity of the jury instructions, without finding §713.34(3) unconstitutional. Secondly, Petitioners point to the strong dissent exhibited by four Justices in Franklin, supra. Justice Powell dissented expressing the view that when viewed as a whole, the jury instructions did not violate due process. Justice Rehnquist, joined by Chief Justice Burger, and Justice O'Connor, dissented expressing the view that the charge read as a whole was constitutional, and that it must be likely that a juror understood the charge to unconstitutionally shift the burden of proof before constitutional error can be found.

A review of the jury instructions in the instant case (Tr. 859-883) reveal that the jury instructions requested by Respondent at trial, but denied by the trial court, were thoroughly covered by the charge given to Respondent's jury. The jury was instructed that the State is required to prove each element of the charge beyond a reasonable doubt (Tr. 863, 865, 866, 872-3). The jury was told that the law does not require the defendant to prove his innocence (Tr. 873, 876). Thus according to four Justices of this Court, the instructions in the instant case did not violate Respondent's due process, and should have been found to be constitutional.

The decision of the Court of Appeals with reference to the harmless error doctrine states:

> [T]he harmless error doctrine may be applicable to a Sandstrom error if the court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Panel opinion at 770)

Then concludes that "the sole evidence of the contractor's intent to defraud was the fact that the contractor received advance payments for work on various projects and did not spend these funds on those specific projects" (A 11), thus that the State offered no evidence of intent to defraud, other than the evidence which gave rise to the presumption. However, the Statement of the Facts as they appear in this Petition shows that the State did present sufficient evidence for the jury to find Respondent guilty as charged even without the presumption challenged here.

Petitioners submits that the evidence for all five counts was sufficient to show that Respondent used the money received for purposes other than to pay for material and for labor furnished for the improvement of real property while such bills remained unpaid. Petitioners, further assert that the admitted fact of non-payment of the various sub-contractors plus the addition of the circumstances surrounding this non-payment leaves no doubt of Respondent's intent to defraud the five victims that contracted with him. The fact that Respondent attempted to rebut all the state's evidence did not require the jury to believe him.

The jury, in fact, chose to believe the testimony of the states witnesses and the verdicts rendered by the jury are supported by the evidence.

The Court of Appeals' opinion further states:

> In the present case, the challanged instructions stated that the failure to spend funds properly "shall constitute prima facie evidence of intent to defraud." By using the term "shall" the instructions command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding. (A 9).

With reference to the Court of Appeals' interpretation of the words "shall constitute prima facie evidence," Petitioners would respectfully cite to this Court's opinion in Barnes v. U.S., 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973) where the conviction of Mr. Barnes was upheld from the "unexplained" possession of recently stolen mail. Just as the Florida Supreme Court stated in

Ferrari:

> [The language] indicates that its presumption does not bind the jury to find that the presumed fact necessarily follows the proven fact, and therefore the presumption is permissive in nature.

Neither due process of law nor equal protection of law under the Constitution is denied if there is a rational connection between the fact proven and the ultimate fact presumed, and provided the party affected is afforded a reasonable opportunity to submit to the jury all the facts on the issue, 23 Fla. Jur. 2d 38, Evidence and Witnesses §9.

Thus, it is clear that not only did the Court of Appeals err in finding the jury instructions unconstitutional, but compounded that error by deciding that because the jury instructions were

unconstitutional, the statute must be unconsitutional as well. This decision is in conflict with the Florida Supreme Court's interpretation of §713.34(3) Florida Statutes (1979), and Petitioners would therefore urge this Court to grant certiorari on this issue and reaffirm the principle that a federal habeas corpus court is not permitted to question or set aside the state court's interpretation of that state's statute.

CONCLUSION

Petitioners have sought to present to this Court a substantial basis upon which to conclude that this area of the law is deserving of being addressed by the United States Supreme Court. There is a solid jurisdictional basis predicated upon conflict between the opinion under review and the opinions rendered by the other state courts of last

resort and federal courts of appeal. Petitioners respectfully submit that this case involves a substantial federal question which should be resolved by this Court, and respectfully request that this Court grant the petition for writ of certiorari to the United States District Court of Appeals, Eleventh Circuit.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

PAGE

Opinion of the United States Court of Appeals, Eleventh Circuit, here underview, filed November 15, 1985

Order of the United States Court of Appeals, Eleventh Circuit, entered on December 16, 1985, denying Petitioner's Suggestion of En Banc Consideration

Opinion of the Florida Supreme Court interpreting §713.34(3) Florida Statutes in State v. Ferrari, 398 So.2d 804 (Fla. 1981)

Order of the United States Court of Appeals for the Eleventh Circuit filed January 1, 1986

Order of Supreme Court of the United States, Washington, D.C. filed January 13, 1986

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INDEX TO APPENDIX

PAGE

Opinion of the United States Court of Appeals, Eleventh Circuit, here undecided, filed November 15, 1993

Order of the United States Court of Appeals, Eleventh Circuit, entered on December 16, 1993, denying Petitioner's Suggestion of En Banc Consideration

Opinion of the Florida Supreme Court interpreting §713.34(3) Florida Statutes in State v. Ferrari, 398 So.2d 804 (Fla. 1981)

Order of the United States Court of Appeals for the Eleventh Circuit filed January 3, 1994

Order of Supreme Court of the United States, Washington, D.C. filed January 13, 1994

Richard MILLER, Petitioner-Appellant,

v.

C.L. NORVELL, Sheriff, St. Lucie County Jail, Dr. Barbara Greadington, Commissioner, FPPC and Louie L. Wainwright, Respondents-Appellees.

No. 85-5171

United States Court of Appeals, Eleventh Circuit.

Nov. 15, 1985.

Appellant is a building contractor. During 1978 and 1979 he entered into construction contracts with five individuals for whom he agreed to build houses. All of these individuals advanced funds to appellant for use on their respective homes. Appellant failed to use this money to pay for work on these houses, and work on each of them was halted.

Appellant was charged with misapplication of funds in violation of Fla.Stat. § 713.34(3). Fla.Stat. § 713.34(3) provides:

(3) Any person, firm, corporation, or agent, officer or employee thereof who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for this specific improvement, while any amount for which he may be or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state; provided, however, that failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud. (Emphasis added.)

Appellant filed a motion to dismiss the charges on the grounds that Fla.Stat. § 713.34(3) was unconstitutional both facially and as applied to him, under both state and federal law. The trial judge denied this motion. Appellant was tried on March 23-28, 1980. At the close of the State's case, appellant renewed his motion, which motion was again denied. He submitted six requested jury instructions which were denied by the trial judge.

At trial, the judge instructed the jury: "Proof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is suf-

ficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Appellant was found guilty on all five counts with which he was charged. He was sentenced to six months in county jail with fourteen-and-one-half years' probation. Appellant's convictions were affirmed on direct appeal. Miller v. State, 407 So.2d 959 (Fla. 4th Dist.Ct. App.1981).

Appellant filed a Petition for Writ of Habeas Corpus in United States District Court for the Southern District of Florida on May 14, 1982. On January 14, 1985, a United States Magistrate recommended that the petition be denied. This recommendation was adopted by the district court on February 8, 1985.
This appeal followed.

I. Constitutionality of the Jury Instructions

A. The Sandstrom Error

Appellant contends that the jury instructions based on Fla.Stat. § 713.34(3) created a mandatory rebuttable presumption on the issue of intent, placing the burden of proof on the defendant with respect to that issue. Appellant contends that the instructions were prohibited by Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny.

In the recent case of Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), which was decided after the district court denied appellant's petition for habeas relief, the Supreme Court said: "A mandatory rebuttable presumption does not remove the presumed element from the case if

the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element unless the defendant persuades the jury not to make such a finding." Id., 105 S.Ct. at 1972-73. The Court held that a mandatory rebuttable presumption is unconstitutional. Id. at 1973.

In State v. Farrari, 398 So.2d 804(Fla. 1981), the Florida Supreme Court considered the constitutionality of the presumption in Fla.Stat. § 713.34(3). The Florida Supreme Court held that a permissive presumption is one which allows the jury to find the presumed fact once the basic fact is proven, but does not require such a finding by the jury. Id. at 806. The court then held that the presumption in Section 713.34(3) "does not bind the jury to find that the presumed fact

necessarily follows the proven fact, therefore the presumption is permissive in nature." Id.

Although the Florida Supreme Court held that the statute in issue, and therefore the jury instruction authorized by that statute, created a permissive inference, this Court owes no deference to that interpretation, The challenged instruction in Francis had previously been construed by the Georgia Supreme Court to create a permissive inference. In rejecting this construction, the United States Supreme Court held: "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning.... The federal constitutional question is whether a reasonable juror could have understood the

[charge] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." Francis, 105 S.Ct. at 1972.

Contrary to what the Florida Supreme Court said, the fact that a presumption does not bind a jury to find that "the presumed fact necessarily follows the proven fact" does not mean that the presumption is a permissive inference. Such a presumption could be either a permissive inference or a mandatory rebuttable presumption. The difference between the two types of presumptions is that, unlike a permissive inference, a mandatory rebuttable presumption requires a jury to find that the presumed fact follows the proven fact unless the defendant produces evidence to rebut the existence of the presumed fact.

[1] In the present case, the challenged instructions stated that the failure to spend funds properly "shall constitute prima facie evidence of intent to defraud." By using the term "shall", the instructions command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding. A reasonable juror thus "could have understood" the instructions to require the jury to find intent to defraud, unless the defendant produced evidence to rebut that finding. Because the instructions in the present case could be interpreted to creat a mandatory rebuttable presumption, the instructions are unconstitutional. Francis, 105 S.Ct. at 1972.

[2] Even if the jury instructions in the present case created a permissive inference, the instructions would be unconstitutional. In Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Supreme Court held that the constitutionality of a permissive inference should be judged in light of the circumstances giving rise to the inference in the particular case. Id. at 162-63, 99 S.Ct. at 2227; see Cosby v. Jones, 682 F.2d 1373, 1376 (11th Cir.1982). Where the proven fact is not the only evidence of a presumed fact that is an element of an offense, a permissive inference can be upheld only if, given that the initial fact is proven, it is "more likely than not" that the presumed fact would follow. See id. at 1376-1377. However, where the proven fact is the sole evidence of

the presumed fact, the inference can be upheld only if, given that the initial fact is proven, the presumed fact would follow beyond a reasonable doubt. See Ulster County Court, 442 U.S. at 167, 99 S.Ct. at 2230.

[3] In the present case, the sole evidence of the contractor's intent to defraud was the fact that the contractor received advance payments for work on various projects and did not spend these funds on those specific projects. Under these circumstances, the inference that, because the contractor did not spend money on projects for which the money was advanced, he intended to defraud the owners must be tested by a "beyond a reasonable doubt" standard. Given the fact that material and labor costs remain unpaid after an advance of contract funds by an owner, it does not

follow beyond a reasonable doubt that a contractor intends to defraud the owner. Thus, even if the presumption in the present case created a permissive inference, the presumption would be unconstitutional.

B. Harmless Error

[4] This Court has held that the harmless error doctrine may be applicable to a Sandstrom error if the court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Davis v. Kemp, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (quoting Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). A Sandstrom error can be harmless beyond a reasonable doubt under two circumstances: (1) where the faulty instruction applied to an element of the crime not at issue at the trial; or (2) where evidence of guilt was "overwhelming."

Davis, 752 F.2d at 1521. In this second situation, the court's analysis should focus on whether evidence of the presumed element (i.e., intent), rather than the more inclusive issue of guilt, is overwhelming. See Tucker v. Kemp, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

[5] Appellant's sole defense in the present case was that he lacked intent to defraud. He claimed that he did not pay the subcontractors because he was involved in contract disputes with them. The faulty instruction, which shifted the burden of proof on intent, thus applied to an element of the crime that was contested at trial. The State offered no evidence of intent to defraud, other than the evidence which gave rise to the presumption in the present case. Under these circumstances, the evidence of appellant's intent was far from over-

whelming. We cannot conslude that, beyond a reasonable doubt, the Sandstrom violation did not contribute to the verdict obtained. The Sandstrom violation was therefore not harmless error.

II. Constitutionality of Fla.Stat. § 713.34(3)

[6] Appellant also challanges the constitutionality of Fla.Stat. § 713.34-(3), both as applied to him and on its face. A statute that relieves the State of the affirmative burden of proving one of the elements of an offense is analyzed in accordance with the same principles as the jury instructions that are based on that statute. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[7] The Florida Supreme Court has held that Fla.Stat. § 713.34(3) creates a permissive inference, and not a manda-

tory rebuttable presumption. Farrari, 398 So.2d 804. Normally, a state supreme court is the ultimate expositor of state law. Mullaney, 421 U.S. at 691 95 S.Ct. at 1886. However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts. We note that to hold otherwise would create the anomalous situation where a statute is held to be constitutional, although jury instructions that are merely a verbatim rendition of the statute are held to be unconstitutional.

[8] For the reasons discussed in the first part of this opinion, we conclude that Fla.Stat. § 713.34(3) creates a mandatory rebuttable presumption. We therefore hold that Fla.Stat. § 713.34(3) is unconstitutional both on its face and as applied to the defendant in the present case. See Francis, 105 S.Ct. at 1973.

The order of the district court denying appellant's Petition for Writ of Habeas Corpus is REVERSED.

A-17

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-5171

RICHARD MILLER, Petitioner-Appellant,

versus

C.L. NORVELL, Sheriff, St. Lucie County Jail, DR. BARBARA GREADINGTON, Commissioner, FPPC, and LOUIE L. WAINWRIGHT,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 15, 1985, 11 Cir., 1985, ____F.2d____).

(December 16, 1985)

Before JOHNSON and HENDERSON, Circuit Judges, and ALIGOOD*, Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitoin for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

SUPREME COURT OF FLORIDA

April 2, 1981

Rehearing Denied June 19, 1981.

STATE OF FLORIDA, Appellant, vs. FRANCO FERRARI AND CHARLES TARANTINO, Appellees.	CASE NO. 58603

ADKINS, Justice.

This case comes to the Court on direct appeal from the Circuit Court of the Ninth Judicial Circuit in and for Orange County. We have jurisdiction since the court below held section 713.34(3), Florida Statutes (1979), unconstitutional. Art. V, § 3(b)(1), Fla. Const.

On March 29, 1978, F & C Builders, a partnership formed by appellees, contracted with Dr. R. W. Geldner to make

improvements to his residence at a cost of $38,280. An advance payment of $14,000 was made when the contract was signed. Thereafter appellee Tarantino was arrested on a fugitive warrant issued by the State of Tennessee charging misapplication of contract funds. Tarantino at that point requested that appellee Ferrari agree to advance him $10,000 from F & C Builders to settle the Tennessee claims and avoid prosecution in that state. Ferrari agreed.

Appellees received a second draw on Dr. Geldner's construction contract on May 15, 1978. The next day Geldner's check for $11,982 was deposited in F & C's bank account, bringing the balance of that account to $12,446.92. On the same day, $10,000 was withdrawn from the F & C account for disbursement in settlement of the Tennessee claims.

F & C Builders was incorporated on

July 6, 1978. Subsequently Ferrari attempted to withdraw from the corporation and took a truck, a trailer, and a riding lawn mower in consideration of his capital investment. Appellees never completed the work on Geldner's home, and materialmen and subcontractors went unpaid.

On July 21, 1979, appellees were charged by information with second-degree grand theft in violation of sections 812.014 and 713.34(3), Florida Statutes (1979). Appellees moved to dismiss, alleging that section 713.34(3) was unconstitutionally void for vagueness and that the presumption of prima facie evidence of intent to defraud, which the statute permits to be drawn from misdirection of contract advances, violated appellees' Sixth Amendment rights to a fair and impartial trial.

The trial court granted the motion to dismiss, holding that section 713.34(3) was impermissibly vague, overbroad and indefinite, and violative of the due process and equal protection clauses of the United States and Florida Constitutions. It was further held that the presumption of prima facie evidence of intent to defraud was irrational and arbitrary and therefore unconstitutional. This appeal followed.

[1] The issue to be decided is whether the court below erred in holding section 713.34(3) unconstitutional. Section 713.34(3), Florida Statutes(1979), provides:

> Any person, firm, corporation or agent, officer or employee thereof who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on

> or materials furnished for this specific improvement, while any amount for which he may be or become liable for such labor, services or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state; provided, however, that failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud.

The aim of the statute is to attach criminal liability for embezzlement to the actions of a contractor who misappropriates construction funds. There are three elements of the offense of embezzlement as described by section 713.34(3). First, there must be a misdirection of funds which have been entrusted to the holder for the purpose of improving real property. Second, the misdirection of funds must take place while a bill for labor, materials or services incurred in improving the property is due (or may

become due) but remains unpaid. Third, the misdirection of funds must be undertaken with the intent to defraud. There is a statutory presumption of prima facie evidence of intent to defraud if bills from suppliers or subcontractors are not paid.

[2,3] First we must address the trial court's holding that the presumption employed by the statute is invalid. It is well settled that only permissive presumptions may be utilized in criminal cases. That is, presumptions "which [allow] the jury to find the presumed fact once the basic fact is proven but [do] not require such a finding by the jury." Fitzgerald v. State, 339 So.2d 209, 211 (Fla. 1976)(emphasis added). The plain language of section 713.34(3) indicated that its presumption does not bind the jury to find that the presumed

fact necessarily follows the proven fact, therefore the presumption is permissive in nature. In fact, the presumption in the instant case is strikingly similar to the presumption of prima facie evidence of intent under section 814.06, Florida Statutes (1973), which we upheld in Fitzgerald.

This Court has recognized two other constitutional restrictions upon presumptions:

> Criminal acts declaring one fact prima facie evidence or presumption of another are frequent. Their purpose is not to relieve the State of the burden of proof, but to allow the establishment of a prima facie case. Constitutional guarantees are not violated as long as there is a rational connection between the fact proven and the ultimate fact presumed and reasonable opportunity is

afforded to rebut the presumption. State v. Kahler, 232 So.2d 166, 168(Fla. 1970)(citations omitted).

The presumption in section 713.34(3) clearly affords a reasonable opportunity for rebuttal. Since the presumption is one of prima facie evidence only, the state is not totally relieved of the burden of proof. Any time after this prima facie evidence of intent is established the defendant may come forward with evidence to negate criminal intent, thereby destroying the presumption and shifting the burden back to the state to prove intent beyond a reasonable doubt. See, e. g., Mann V. State, 209 So.2d 472 (Fla. 1st DCA 1968).

[4] There is a rational relationship between the proven fact that material and labor costs remain unpaid after an advance of contract funds, and

the presumed fact that the contractor intends to defraud. Those contractors who intend to defraud their clients must to some degree incur material and labor debts in order to keep up a minimal level of activity on the job and extract subsequent contract draws. Clearly, such an embezzlement scheme would be fruitless if the contractor in fact paid all costs incurred on the job out of the funds received. Considering these factors, the legislature could have determined that the failure to pay suppliers and materialmen constitutes sufficient indication of intent to defraud that it should be prima facie evidence of such intent. It follows that the requisite relationship between the proven and presumed facts exists here. Accordingly, we conclude that the presumption of section 713.34(3) passes constitutional muster.

The trial court also found section 713.34(3) to be vague and overbroad. These are two substantially different defects.

[5-8] A vague statute is one which is constitutionally infirm because its language is so unclear or ambiguous that persons of reasonable intelligence must guess at what conduct is proscribed. Our reading of section 713.34(3) reveals no unclear language, The appellees assert that problems exist with regard to determining when a material bill is owing. They direct our attention to language in the Mann decision, supra, stating that the statute is vague and indefinite in that respect.

We will not determine the constitutionality of the Statute in question because it was not properly raised in the lower court, but we can, and we

think properly so, say and determine that said statute is so vague and indefinite as to times, such as "when is a material bill owing," that it becomes completely impractical, if not impossible for a building contractor to contract for work on more than one house at a time and pay for anything without being in violation of said act.

209 So.2d at 474. (The statute considered by the Mann court was section 84.341 (3), which has been superseded by a practically identical section 713.34(3). By the court's admission this reasoning was not necessary to the decision and therefore was dicta. We believe a deeper inquiry into the constitutionality of the statute would have lead to a different conclusion. Granted, the statute does not precisely define when a bill becomes due and owing, but no such definition

is necessary. The statute is to be read in pari materia with Florida's version of the Uniform Commercial Code, more precisely chapter 672, Florida Statutes, concerning Sales, and Florida contract law. Such a reading allows consideration of variable factors such as prior dealings between the contractor and the creditor and usage of trade, simultaneously solving any vagueness problems.

[9-11) A statute is overbroad if it is so all-encompassing in its reach that it ensnares both protected and non-protected conduct. Appellees argue that section 713.34(3) is overbroad since it is impossible for an honest contractor to operate without violating the statute because the cash flow realities of the construction business frequently mandate that a contractor engaged in numerous projects use funds advanced for one job to pay subcontractors or suppliers on

another. They assert that it is common practice for a contractor to use incoming funds to discharge his most pressing obligations and replace them later with the proceeds of other jobs. Whether this practice violates section 713.34(3) depends on the intent of the contractor. Considering the elements of embezzlement discussed above it is apparent that a contractor may inadvertently misdirect funds without an intent to defraud. In that situation, the statutory presumption of intent to defraud may be rebutted by evidence showing that, even though the contractor misdirected funds while a bill for labor, materials, or services incurred in improving the property is due (or may become due) but remainds unpaid, the misdirection was without intent to defraud. It is then for the jury to determine whether the contractor has successfully

rebutted the State's prima facie case. We reject appellees' contention that it is not possible for an honest contractor to operate without violating section 713.34(3), and we hold that this statute is not overbroad.

In summary, we hold that section 713.34(3), Florida Statutes, is not unconstitutionally overbroad or vague. The presumption of prima facie evidence of intent within the statute is also constitutional. All other bases on which the trial court anchored its holding have been considered and are without merit. Therefore, the order of dismissal holding section 713.34(3) unconstitutional is hereby reversed, and the case is remanded for trial.

It is so ordered.

BOYD, OVERTON and ALDERMAN, JJ., concur.

SUNDBERG, C.J., dissents with an opinion with which ENGLAND and McDONALD, JJ., concur.

SUNDBERG, Chief Justice, dissenting.

Although the precedents setting the appropriate standard for testing criminal presumptions are unclear in Florida, I submit that the presumption utilized in section 713.34(3), Florida Statutes (1979), meets neither of the tests heretofore articulated.

[3] The United States Supreme Court in setting standards for statutory presumptions began with a rational connection test in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), proceeded to a "more likely than not" test in Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), and culminated in an ambiguous combin-

ation of "more likely than not" with "beyond a reasonable doubt" standard in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). Florida has examined the issue in MacMillan v. State, 358 So.2d 547 (Fla. 1978), and Fitzgerald v. State, 339 So.2d 209 (Fla. 1976). MacMillan applied the "more likely than not" test, though it equated it to the rational connection standard. That case did not need to reach the reasonable doubt standard since the statute did not meet the lower "more likely than not" standard. Fitzgerald apparently applied a reasonable doubt standard, interpreting Barnes to require satisfaction of this highest standard.

It is clear to me that in the course of human experience it is neither "more likely than not" nor "beyond a

reasonable doubt" that a contractor intends to defraud simply because material and labor costs remain unpaid after an advance of contract funds by the owner. As a matter of judicial knowledge, it is common practice in the construction industry to treat contract receipts as fungible for purposes of defraying labor and material costs in subdivision developments. In our inflationary economy with material costs escalating daily, it has been almost essential to buy building materials in advance, in bulk amounts for use on multiple house "starts." To do otherwise would result in a further increase in residential housing prices, which already strain the imagination. No contractor has felt obligated to match up invoices against revenues for each job contracted--on a trust accounting, "collect-on-delivery" basis--any-

more than the local haberdasher has felt bound to apply a customer's layaway payment against the invoice for the particular three piece suit selected.

Because an impermissible presumption is employed by section 713.34(3), I would affirm the trial judge, and for the same reason I dissent from the majority opinion.

ENGLAND and McDONALD, JJ., concur.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-5171

RICHARD MILLER,

Petitioner-Appellant,

versus

C.L. NORVELL, Sheriff, St. Lucie County Jail
DR. BARBARA GREADINTON, Commissioner, FPPC, and
LOUIE L. WAINWRIGHT,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

O R D E R:

(X) The motion of appellees for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellees for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk

of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance, of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

A-39

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 13, 1986

Joy B. Shearer, Esquire
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33401

Re: C. L. Norvell, Sheriff, etc., et al. v. Richard Miller, A-536

Dear Ms. Shearer:

Your application for recall and stay of mandate pending the timely filing and disposition of a petition for a writ of certiorari in above-entitled case has been presented to Justice Powell, who has endorsed thereon the following:

"Denied
L.F.P.
1/13/86"

Very truly yours,
JOSEPH F. SPANIOL, JR., Clerk

By

Christopher W. Vasil
Deputy Clerk

vm

cc: Anthony Calvello, Esq.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1359

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C.L. NORVELL, Sheriff, St. Lucie Jail, DR. BARBARA GREADINGTON, Commissioner, FPPE, and LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Petitioner,

vs.

RICHARD MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, FL 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

ANTHONY CALVELLO
Assistant Public Defender

Counsel for Respondent.

33pp

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeal correctly held that Section 713.34(3), Fla. Stat. (1979) is unconstitutional on its face and as applied to Respondent.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Constitutional Provisions	1
Florida Statute Involved	2
Statement of the Case	2 - 5
Reasons for Denying the Writ	6 - 13

THE ELEVENTH CIRCUIT COURT OF APPEAL CORRECTLY RULED THAT SECTION 713.34(3) FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT.

Conclusion	13
Certificate of Service	13

TABLE OF AUTHORITIES

CASES	PAGE
Barnes v. United States, 412 U.S. 837 (1973)	6,12
County Court of Ulster County v. Allen 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)	6,7,9
Crowley v. Christian, 137 U.S. 86 (1981)	11
Francis v. Franklin, 105 S.Ct. 1971	7,9,10, 11,12,13
In re Winship, 397 U.S. 364 (1970)	6,7
Miller v. Norvell, et al., 775 F.2d 1572 (11th Cir. 1985)	1,8,10, 11-12
Minnesota v. Barber, 136 U.S. 313 (1890)	10
Mullaney v. Wilbur, 421 U.S. 698-701, 95 S.Ct. at 1889-1890	8,10,13
Patterson v. New York, 432 U.S. 197 (1977)	7,8
Sandstrom v. Montana, 444 U.S. 510 (1979)	7,11, 12,13
State v. Chambers, 709 P.2d 321 (Utah 1985)	12
State ex rel. Moore v. Woods, 420 F.2d 1260, 1262 (7th Cir. 1970)	11
State v. Ferrari, 398 So.2d 804 (Fla. 1981)	8-10
Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171 (5th Cir. 1979)	11
OTHER AUTHORITIES	
Florida Statutes	
§713.34(3) (1979)	2,7,11, 12-13
United States Constitution Amendment XIV	1

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C.L. NORVELL, Sheriff, St. Lucie Jail, DR. BARBARA GREADINGTON, Commissioner, FPPE, and LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Petitioner,

vs.

RICHARD MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

Respondent, RICHARD MILLER, hereby submits the following Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, was issued on November 15, 1985; that court denied rehearing and rehearing En Banc on December 16, 1985. Miller v. Norvell, et al., 775 F.2d 1572 (11th Cir. 1985). (See Appendix).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLORIDA STATUTE INVOLVED

Section 713.34(3), Florida Statutes (1979) provides as follows:

> (3) Any person, firm, corporation or agent, officer or employee thereof who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for this specific improvement, while any amount for which he may or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state; provided, however, that failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud.

STATEMENT OF THE CASE

Although the Statement of the Case in the Petition contains an essentially accurate review of the facts of the case, Respondent would supplement that statement with general important facts that were not mentioned. Respondent will refer to the transcripts of the trial in the same manner as the Petitioner (Tr).

Respondent, RICHARD MILLER testified in his own behalf that as President of Pointe South Builders, Inc., he entered into five (5) contracts and agreed to build homes for the five individuals pursuant to a contract. Tr.534. For these five contested cases, Respondent did not in any way alter his usual business practices. Tr.535. All the funds received from the five building contracts were deposited in the account of Pointe South Builders, Inc. The funds were used to pay the bills of Pointe South Builders, Inc. Tr.535. Respondent absolutely denied any intent to defraud anyone. Tr.526.

Respondent testified as to the Sbariscias (Count I) the down payment was placed in the corporation's operating account. Tr.537. There was no agreement or understanding with Mr. Sbariscia that the funds were to be held in trust for his property. Tr.537. No trust provision was reflected in the parties' written agreement. Tr.537. Respondent never told the Sbariscias that the funds received would be used specifically for work on his house. Tr.537. Respondent never intended to defraud

or deceive him. Tr.537. His only intent was to build the house. Tr.537-538. He never specifically told them that their home would be built in ninety days. Tr.539. This was also true of Mrs. Banke (Count III). Tr.538. All the terms and conditions of the Banke contract and construction were identical to the Sbariscias. Tr.538.

Respondent testified in regard to Mr. Vogt (Count IV) that he never intended to defraud him. Tr.539. His only intent was to complete the contract and perform according to the terms of said contract. Tr.539-540. Respondent did not represent that the funds received would be held in trust nor did the contract provide. Tr.540.

Respondent testified as to the Feshs (Count V) that he never intended to defraud them. Tr.540. His only intent was to build the home. Tr.540. As to the Lotsof's (Count II) his only intent was to build a house according to the terms of the contract. Tr.540. When Respondent stopped work on the Lotsof's home, he felt that the Lotsof's were in breach of the contract. Tr.541. Respondent did not specifically mention a ninety day completion date to her. Tr.542.

Respondent testified that with the Feshs (Count V) that he never intended to defraud them. Tr.542. His only intention was to build the home pursuant to the contract entered into between the parties. Tr.542.

Respondent stated that he went on a combined business/ vacation trip from June 24, 1979 to August 1979. Tr.542,546. The trip was not part of any scheme to defraud his customers. Tr.543. Respondent did not tell Mr. Richner to collect funds from the five people to finance his trip. Tr.557. The funds for the trip were not entirely paid for out of Pointe South Builders fund. Tr.625. The trip funds also came from his wife's funds and the proceeds of a special job. Tr.696.

At this point in time, Respondent had twelve (12) different houses under construction. Tr.547. Respondent left his supervisor, Clyde Richner in charge of the construction. Tr.546. He contacted his supervisor each week. Tr.546. Respondent informed

all his customers of his travel plans. Tr.548. It was Clyde Richner's job to maintain the construction schedule. Tr.547. During the first two weeks of his business/vacation trip everything was under control but problems developed. Tr.548. Respondent contacted his customers directly. Tr.548. Respondent made calls to subcontractors to ascertain exactly what were the causes of these construction delays. Tr.550. Respondent's sole intent was to get the homes completed. Tr.551.

In reference to Respondent's automobile, Respondent testified that his wife owned a 1979 Lincoln Continental. Tr.637. Originally Pointe South Builders purchased the car new on March 30, 1979. Tr.637. The corporation traded in its Cadillac and the bank financed practically all of the balance. Tr.638. Mrs. Miller assumed the payments on the vehicle. Tr.637.

The initial deposits Respondent received from his customers were to pay for his labor, plans and permits to commence construction of the home. Tr.687-688. Respondent testified that their money was used for specific business expenditures. Tr.767.

Respondent testified that numerous problems developed with the individual construction projects. There were problems with land fill operations. Tr.561. There were delays with the architect. Tr.571. The Lotsoff's family made unreasonable demands upon Respondent. Tr.582. Also during September, 1979, a hurricane halted construction for twenty-three days. Tr.583-584.

Respondent testified that the reason that the subcontractors and materialmen were not paid was basically because there were contract disputes. Tr.551,802. The people stopped him from building and hence were in breach. Tr.686. The non-payment of bills by Respondent was not part of any intent to defraud those people. Tr.551. All the money received was placed into Pointe South Builders checking account and used to pay bills as the corporation received them. Tr.552. As corporate bills fell due, they were paid. Tr.552. This was always Respondent's general practice even before he entered into these five contracts.

Tr.552. When Respondent signed the contracts he estimated that his profit range would be from $7,000.00 - $10,000.00 per house. Tr.554.

Respondent understood that any and all funds given to him under contract would be placed into a general operating account to pay any and all corporate bills derived from any source. Tr.559. No specific money was to be applied as such to any specific bills for any specific purpose. Tr.559. The Vogts stopped the issuance of a building permit. Tr.559.

Respondent had numerous business expenditures. Tr.768. He purchased supplies and paid the subcontractors. Tr.771. He had advertising expenses, phone bills, truck payments, vehicle maintenance and gas, the salary of Clyde Richner, and his own salary. Tr.771. Respondent's only intent when he entered into contracts and received down payments was to build the homes. Tr.822. Respondent never intended to defraud anyone by taking or using their initial deposit. Tr.816. Respondent did not "defraud" anyone. Tr.822. According to Respondent his business problems all stemmed from leaving an incompetent man, Clyde Richner, in charge of construction. Tr.824.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY RULED THAT SECTION 713.34(3) FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 364 (1970).

Two of the most fundamental features of our criminal justice system are the presumption of innocence and the requirement that the state prove each element of a crime beyond a reasonable doubt. Of course, legislatures have on occasion, passed legislation which provide that proof of an evidentiary fact can or must be construed as proof of an element of a crime charged. The effect of such legislation is the creation of a presumption that flows from the established evidentiary fact. See County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

The constitutionality of the statutory presumption in a criminal statute depends "...on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." Ulster County, 442 U.S. at 156. Where a statute provides that proof of an evidentiary fact necessarily constitutes proof of an element of the crime, the statute creates a mandatory presumption that proof of the former is deemed proof of the latter. A permissive presumption is one "which allows -- but does not require -- the trier of fact to infer the [ultimate] fact from proof by the prosecutor of the [basic fact] ...." Id., at 157.

In Barnes v. United States, 412 U.S. 837 (1973), and Ulster County, the Court clarified the constitutional standards by which each type of presumption will be judged. If a presumption is permissive, the record must disclose that the presumed fact "more likely than not" flows from the underlying facts in the particular case at issue. If a presumption is mandatory, the statute is

analyzed on its face to determine whether the presumed fact flows beyond a reasonable doubt from the underlying facts. In Francis v. Franklin, ___U.S.___, 105 S.Ct. 1965 (1985), the Court held:

> Mandatory presumptions must be measured against the standards of Winship as elucidated in Sandstrom. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. Patterson v. New York, supra, at 215 ("a State must prove every ingredient of an offense beyond a reasonable doubt and...may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also Sandstrom, supra, at 520-524; Mullaney v. Wilbur, supra, at 698-701.

105 S.Ct. 1971

The Court also noted in Francis:

> (2) A mandatory presumption may be either conclusive or rebuttable.... A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See Sandstrom v. Montana, 442 U.S. 510, 517-518, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979).

105 S.Ct. at 1971 n.2 (emphasis supplied)

In order for a mandatory presumption to adequately safeguard the "beyond a reasonable doubt" standard, the evidentiary fact must be sufficient to prove the elemental fact beyond a reasonable doubt because the factfinder is denied any discretion to assign its own weight to the proven evidentiary fact. Also to hold otherwise would sanction an impermissible shift of the burden of proof of an element of the crime charged.

At bar, the court of appeals, relying on the Court's decision in Francis v. Franklin, supra, held that the presumption contained in §713.34(3) created an unconstitutional mandatory rebuttable presumption. Id. at 1576. This ruling is also supported by the Court's decisions in Sandstrom v. Montana, 444 U.S. 510 (1979); Ulster County, supra; Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); Barnes v. United States, supra; In re Winship, supra.

In Mullaney v. Wilbur, 421 U.S. 684 (1975) the Court explicitly held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the

question of intent. Id. at 698-701. The presumption at bar suffers from this same infirmity. As the Court later explained in Patterson v. New York, supra:

> "Mullaney surely held that a State ... may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.... Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

432 U.S. at 215. See also Leary v. United States, 395 U.S. 6 (1969) (Statutory presumption of knowledge contained in 21 U.S.C. section 176(a) was invalid under the due process clause).

Petitioner in his brief notes that the Florida Supreme Court in State v. Ferrari, 398 So.2d 804 (Fla. 1981), held that the presumption employed by the statute is permissive and passes constitutional muster. Petitioner relies upon Ferrari to assail the court of appeals' conclusion that this same presumption was mandatory and held the statute unconstitutional. However, the Florida court's Ferrari decision is fundamentally unsound and does not control resolution of the federal constitutional question, for it is in clear violation of the principles established by this Court in assessing presumptions in criminal cases. The court was correct on two separate grounds in declining the reasoning of the state court Ferrari decision.

In State v. Ferrari, the trial court held §713.34(3), Fla. Stat. (1979), to be unconstitutional on its face holding, inter alia, that the presumption employed by the statutes is invalid. In a 4-3 decision, the Florida Supreme Court reversed, holding that the presumption contained in the statute was not unconstitutional on its face. Justice Adkins writing for the majority reasoned:

> The plain language of §713.34(3) indicates that its presumption does not bind the jury to find that the presumed fact necessarily follows the proven fact, therefore the presumption is permissive in nature....
>
> The presumption in §713.34(3) clearly affords a reasonable opportunity for rebuttal. Since the presumption is one of prima facie evidence only, the state is not totally relieved of the burden of proof. Any time after this prima facie evidence of intent is established that defendant may come forward with evidence to

> negate criminal intent, thereby destroying the presumption and shifting the burden back to the state to prove intent beyond a reasonable doubt. See, e.g., Mann v. State, 209 So.2d 472 (Fla.1st DCA 1968).

398 So.2d at 806-07.

The Florida Supreme Court did not have the benefit of the Court's decision in Francis v. Franklin when it rendered its decision in Ferrari. And Francis demonstrates the fatal flaw in the Florida court's reasoning. Just because a statutory presumption can be rebutted does not automatically turn it into a permissive presumption. Yet that erroneous premise was the foundation of the Ferrari decision. Likewise, the Ferrari court also employed a constitionally improper test in determining the validity of the presumption contained in the statute.

In Francis v. Franklin, supra, the Court explained: "A mandatory presumption may be either conclusive or rebuttable.... A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted." 105 S.Ct. at 1971 n.2. Also in Ulster County, supra, the Court explained that a permissive presumption "allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." Id., at 157. Therefore contrary to the holding by the Florida Supreme Court, the presumption employed by §713.34(3) is mandatory and not permissive.

The presumption in §713.34(3) is mandatory because it tells the trier of fact that upon proof of the basic fact (failure to pay for such labor, services or material furnished for the specific improvement after receipt of such proceeds) it shall find the crucial elemental fact (shall constitute prima facie evidence of intent to defraud) at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. The "shall" coupled with "prima facie evidence" makes said presumption mandatory. See County Court of Ulster County v. Allen, supra; Francis v. Franklin, supra.

The Eleventh Circuit explained the fallacy of the Florida Supreme Court's decision in Ferrari as follows:

> Contrary to what the Florida Supreme Court said, the fact that a presumption does not bind a jury to find that "the presumed fact necessarily follows the proven fact" does not mean that the presumption is a permissive inference. Such a presumption could be either a permissive inference or a mandatory rebuttable presumption.

775 F.2d at 1575 (emphasis supplied).

The Court also ruled that the statutory presumption, by its use of the term "shall", "command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding." 775 F.2d at 1575. Hence, the language of the statute on its face created a mandatory rebuttable presumption. Therefore contrary to the holding by the Florida Supreme Court, the presumption employed by §713.34(3) is mandatory and not permissive. It follows from the above analysis that the Eleventh Circuit was not "bound" to follow the ruling of the Florida Supreme Court on this federal constitutional issue.

Moreover, whether a presumption employed by a state statute is an unconstitutional mandatory presumption proscribed by the Due Process Clause is clearly a federal question. See Francis v. Franklin, supra; Mullaney v. Wilbur, supra. The court of appeals correctly followed the Court's rulings in so holding:

> The Florida Supreme Court has held that Fla.Stat. §713.34(3) creates a permissive inference, and not a mandatory rebuttable presumption. Farrari, 398 So.2d 804. Normally, a state supreme court is the ultimate expositor of state law. Mullaney, 421 U.S. at 691, 95 S.Ct. 1886. However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts.

775 F.2d at 1574 (emphasis supplied).

A federal court may determine in a habeas corpus proceeding the federal constitutionality of a state statute under which a defendant was convicted. Minnesota v. Barber, 136 U.S. 313

(1890). Even if a state court has determined that a state provision is valid, the federal court is only bound by the decision if it appears that the provision does not contradict some provision of the federal constitution. See Crowley v. Christian, 137 U.S. 86 (1891). Although a state supreme court's construction of state law is binding on a federal court, the federal court is not bound by the state court determinations on federal constitutional issues. Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171 (5th Cir. 1979); State ex rel. Moore v. Woods, 420 F.2d 1260, 1262 (7th Cir. 1970).

The statutory presumption in §713.34(3) is unconstitutional on its face and as applied to Respondent. The presumption is an unconstitutional mandatory burden shifting presumption which does not meet the appropriate due process standards. Although not reached by the lower court, Respondent also contends that §713.34(3) is void for vagueness. Hence the Eleventh Circuit correctly applied the standards enunciated by the Court in judging presumptions in criminal statutes to declare §713.34(3) unconstitutional on its face and as applied to Respondent. For these reasons the Petition should be DENIED.

Petitioner also suggests that the court of appeals not only erred "in finding the jury instructions unconstitutional but compounded that error by deciding that because the jury instructions were unconstitutional, the statute must be unconstitutional as well."

Petitioner has obviously misread or misunderstood the holdings of this Court in the cases cited and specifically the holding of the eleventh circuit court of appeals in this cause.

The eleventh circuit court correctly applied the principles established by the Court in Francis v. Franklin, supra, and Sandstrom v. Montana, in ruling that the jury instructions given at bar based on §713.34(3) created an unconstitutional mandatory rebuttable presumption on the issue of intent by placing the burden of proof on the defendant with respect to that issue:

> A reasonable juror thus "could have understood" the instructions to require the jury to find intent to defraud, unless the defendant produced evidence to rebut that finding. Because the instructions in the present case

> could be interpreted to create a mandatory rebuttable presumption, the instructions are unconstitutional. Francis, 105 S.Ct. 1972.

775 F.2d at 1575.

Assuming arguendo a Sandstrom-Francis issue can be deemed harmless, the eleventh circuit engaged in a careful examination of the record and concluded that the "Sandstrom violation was therefore not harmless error." 775 F.2d at 1576.

Petitioner cites the case of State v. Chambers, 709 P.2d 321 (Utah 1985) noting that the state court found the jury instructions unconstitutional under Francis v. Franklin but upheld the criminal statute (UCA §76-6-402(1)) from which the language of the instruction was drawn. However, Petitioner fails to mention that the common statutory presumption contained in the Utah statute (possession of recently stolen property) has withstood numerous challenges including one by the Court in Barnes v. United States. The presumption utilized in §713.34(3), Fla. Stat. (1979) is clearly distinguishable and obviously unconstitutional.

Finally, Petitioner claims that the Eleventh Circuit Court of Appeals erred by deciding that "because the jury instructions were unconstitutional, the statute must be unconstitutional as well." Petitioner misconstrues the reasoning of the Eleventh Circuit on this point. There was no such ruling by the Court.

The Eleventh Circuit, citing Francis v. Franklin, held that the test in construing the jury instructions is not what the state supreme court declares the meaning of a jury instruction to be, but rather what a reasonable juror could have understood the charge as meaning. This is a federal constitutional question. 775 F.2d at 1574. Thereafter, in discussing the constitutionality of §713.34(3), the court of appeals noted:

> However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts. We note that to hold otherwise would create the anomalous situation where a statute is held to be constitutional, although jury

> instructions that are merely a verbatim rendition of the statute are held to be unconstitutional.

775 F.2d at 1576 (emphasis supplied).

Accordingly, the Eleventh Circuit merely applied the established principle that it is a federal question whether a jury instruction or state criminal statute employs a presumption in violation of the Due Process Clause. Petitioner's attempt to attribute any other holding to the court of appeals is without merit. In essence, Petitioner is taking dicta from the opinion and unjustifiably characterizing it as the holding. Each issue is a federal question which can properly be resolved by federal courts.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeal in this case is entirely consistent with the decisions of this Court and review of said opinion is unwarranted. Therefore, based on the grounds and authorities cited herein, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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APPENDIX

APPENDIX

the trial judge, upon finding that inadequate record keeping made it impossible to determine if an unnecessary duplication of work existed, held that the award would be reduced by lowering the hourly rates he would have otherwise utilized. The court, however, failed to indicate how much it reduced the hourly rates. In the absence of such information we are unable to determine the reasonableness of the reduction. The district court's increase of the hourly rates to reflect the delayed payment shares the same infirmity. In *Johnson v. University College of the University of Alabama*, 706 F.2d 1205, 1210-11 (11th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983), we held that, in determining a reasonable fee, a district court must take into account the delay in payment suffered by the plaintiff. The district court in this case, although noting that "[t]he delay plaintiffs have experienced in receiving the award made here is reflected in the hourly rates discussed," never set out precisely what part of the rates represented compensation for delayed payment.[16] Thus we cannot determine whether the adjustment for delay in payment was adequate.

IV.

We hold that the law of the case doctrine does not foreclose the award of attorneys' fees for services performed prior to 1971. Accordingly, we vacate the district court's order with the instruction that the court, after making appropriate findings of fact, fashion a new award.

VACATED and REMANDED.

16. In *Johnson v. University College of the University of Alabama*, 706 F.2d at 1210-11, we suggested that one way of adjusting the fees awarded for delay in payment would be to compensate counsel at current rather than historical hourly rates. There is no indication from the district court's order that this method was used, the hourly figures arrived at by the court seem too low to be current rates, unless a larger reduction than would seem appropriate was imposed because of the inadequate record keeping. In our view, however, using current rates to account for the delay in payment is somewhat inaccurate as it assumes that the increase in legal fees mirrors that of inflation, which in many instances is not the case. A more accurate method for adjusting for delays in payment would be to apply to the award a figure which is recognized as representing the time value of money over the period of the litigation.

Richard MILLER, Petitioner-Appellant,

v.

C.L. NORVELL, Sheriff, St. Lucie County Jail, Dr. Barbara Greadington, Commissioner, FPPC and Louie L. Wainwright, Respondents-Appellees.

No. 85-5171.

United States Court of Appeals, Eleventh Circuit.

Nov. 15, 1985.

Building contractor, who had been convicted of criminal misapplication of funds, brought petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied petition, and contractor appealed. The Court of Appeals, Johnson, Circuit Judge, held that criminal statute prohibiting misapplication of funds, which provided that failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud," created unlawful mandatory rebuttable presumption of intent, and was unconstitutional both on its face and as applied to contractor.

Reversed.

1. Criminal Law ⇐277(2)

In prosecution of building contractor for criminal misapplication of funds, jury instruction that contractor's failure to spend funds properly "shall constitute prima facie evidence of intent to defraud" created unconstitutional mandatory rebuttable presumption. West's F.S.A. § 713.3463).

2. Criminal Law ⇐324

Where proven fact is not only evidence of presumed fact that is element of offense, permissive inference can be upheld only if, given that initial fact is proven, it is more likely than not that presumed fact would follow; however, where proven fact is sole evidence of presumed fact, inference can be upheld only if, given that initial fact is proven, presumed fact would follow beyond reasonable doubt.

3. Criminal Law ⇐778(2)

Even assuming that jury instruction in prosecution for criminal misapplication of funds, to effect that defendant's failure to spend funds properly "shall constitute prima facie evidence of intent to defraud," created only permissive inference on issue of intent, instruction was unconstitutional, where sole evidence of defendant's intent to defraud was fact that he received advance payments for work on various projects and did not spend funds on those specific projects. West's F.S.A. § 713.34(3).

4. Criminal Law ⇐1172.2

Error in jury charge creating mandatory rebuttable presumption can be harmless beyond reasonable doubt under two circumstances: where faulty instruction applied to element of crime not at issue at trial, or where evidence of guilt was overwhelming; in second situation, court's analysis should focus on whether evidence of presumed element, rather than more inclusive issue of guilt, is overwhelming.

5. Criminal Law ⇐778(2), 1172.2

Jury instruction in prosecution for criminal misapplication of funds, which created unconstitutional mandatory rebuttable presumption on issue of intent, was reversible error, where state offered no evidence of intent to defraud other than evidence which gave rise to unconstitutional presumption. West's F.S.A. § 713.34(3).

6. Criminal Law ⇐327

Statute that relieves state of affirmative burden of proving one of elements of offense is analyzed in accordance with same principles as jury instructions that are based on that statute.

7. Federal Courts ⇐404

While state Supreme Court is generally ultimate expositor of state law, when state court determines whether statute creates mandatory rebuttable presumption or permissive inference in criminal setting, court is directly deciding question of whether statute comports with federal constitutional requirements, and that determination is subject to review by federal courts.

8. Embezzlement ⇐2

Florida criminal statute prohibiting misapplication of funds, which provided that failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud," created unlawful mandatory rebuttable presumption on issue of intent, and was unconstitutional, rejecting *State v. Farren*, 398 So.2d 804.

Anthony Calvello, Asst. Public Defender, West Palm Beach, Fla., for petitioner-appellant.

Georgina Jimenez-Orosa, Asst. Atty. Gen., West Palm Beach, Fla., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges, and ALL GOOD*, District Judge.

JOHNSON, Circuit Judge:

Appellant is a building contractor. During 1978 and 1979 he entered into construction contracts with five individuals for whom he agreed to build houses. All of these individuals advanced funds to appellant for use on their respective homes. Appellant failed to use this money to pay for

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

work on these houses, and work on each of them was halted.

Appellant was charged with misapplication of funds in violation of Fla.Stat. § 713.345. Fla.Stat. § 713.345(1) provides, "If any person, firm, corporation, or agent, officer or employee thereof who, *with intent to defraud*, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for the specific improvement, while any amount for which he may be or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state, *provided, however that failure to pay for such labor, services or materials furnished for the specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud*." (Emphasis added.)

Appellant filed a motion to dismiss the charges on the grounds that Fla.Stat. § 713.345 was unconstitutional both facially and as applied to him, under both state and federal law. The trial judge denied this motion. Appellant was tried on March 23-28, 1980. At the close of the State's case, appellant renewed his motion, which motion was again denied. He submitted six requested jury instructions which were denied by the trial judge.

At trial, the judge instructed the jury, "Proof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Appellant was found guilty on all five counts with which he was charged. He was sentenced to six months in county jail with fourteen-and-one half years' probation. Appellant's convictions were affirmed on direct appeal. *Miller v. State*, 407 So.2d 970 (Fla. 4th Dist.Ct.App.1981).

Appellant filed a Petition for Writ of Habeas Corpus in United States District Court for the Southern District of Florida on May 14, 1982. On January 13, 1985, a United States Magistrate recommended that the petition be denied. This recommendation was adopted by the district court on February 8, 1985. This appeal followed.

I. Constitutionality of the Jury Instructions

A. The *Sandstrom* Error

Appellant contends that the jury instructions based on Fla.Stat. § 713.345 created a mandatory rebuttable presumption on the issue of intent, placing the burden of proof on the defendant with respect to that issue. Appellant contends that the instructions were prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny.

In the recent case of *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), which was decided after the district court denied appellant's petition for habeas relief, the Supreme Court said, "A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element unless the defendant persuades the jury not to make such a finding." *Id.*, 105 S.Ct. at 1972-73. The Court held that a mandatory rebuttable presumption is unconstitutional. *Id.* at 1973.

In *State v. Ferrari*, 398 So.2d 804 (Fla. 1981), the Florida Supreme Court considered the constitutionality of the presumption in Fla.Stat. § 713.345. The Florida Supreme Court held that a permissive presumption is one which allows the jury to find the presumed fact once the basic fact is proven, but does not require such a finding by the jury. *Id.* at 806.

The court then held that the presumption in Section 713.31(3) "does not bind the jury to find that the presumed fact necessarily follows the proven fact, therefore the presumption is permissive in nature." *Id.*

Although the Florida Supreme Court held that the statute in issue, and therefore the jury instruction authorized by that statute, created a permissive inference, this Court owes no deference to that interpretation. The challenged instruction in *Francis* had previously been construed by the Georgia Supreme Court to create a permissive inference. In rejecting this construction, the United States Supreme Court held: "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning.... The federal constitutional question is whether a reasonable juror could have understood the [charge] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Francis*, 105 S.Ct. at 1972.

Contrary to what the Florida Supreme Court said, the fact that a presumption does not bind a jury to find that "the presumed fact necessarily follows the proven fact" does not mean that the presumption is a permissive inference. Such a presumption could be either a permissive inference or a mandatory rebuttable presumption. The difference between the two types of presumptions is that, unlike a permissive inference, a mandatory rebuttable presumption *requires* a jury to find that the presumed fact follows the proven fact *unless* the defendant produces evidence to rebut the existence of the presumed fact.

[1] In the present case, the challenged instructions stated that the failure to spend funds properly "shall constitute prima facie evidence of intent to defraud." By using the term "shall," the instructions command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding. A reasonable juror thus "could have understood" the instructions to *require* the jury to find intent to defraud, *unless* the defendant produced evidence to rebut that finding. Because the instructions in the present case could be interpreted to create a mandatory rebuttable presumption, the instructions are unconstitutional. *Francis*, 105 S.Ct. at 1972.

[2] Even if the jury instructions in the present case created a permissive inference, the instructions would be unconstitutional. In *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Supreme Court held that the constitutionality of a permissive inference should be judged in light of the circumstances giving rise to the inference in the particular case. *Id.* at 162-63, 99 S.Ct. at 2227; *see Cosby v. Jones*, 682 F.2d 1373, 1376 (11th Cir.1982). Where the proven fact is not the only evidence of a presumed fact that is an element of an offense, a permissive inference can be upheld only if, given that the initial fact is proven, it is "more likely than not" that the presumed fact would follow. *See id.* at 1376-77. However, where the proven fact is the *sole* evidence of the presumed fact, the inference can be upheld only if, given that the initial fact is proven, the presumed fact would follow beyond a reasonable doubt. *See Ulster County Court*, 442 U.S. at 167, 99 S.Ct. at 2230.

[3] In the present case, the sole evidence of the contractor's intent to defraud was the fact that the contractor received advance payments for work on various projects and did not spend these funds on those specific projects. Under these circumstances, the inference that, because the contractor did not spend money on projects for which the money was advanced, he intended to defraud the owners must be tested by a "beyond a reasonable doubt" standard. Given the fact that material and labor costs remain unpaid after an advance of contract funds by an owner, it does not follow beyond a reasonable doubt that a contractor intends to defraud the owner. Thus, even if the presumption in the

present case created a permissive inference, the presumption would be unconstitutional.

B. Harmless Error

[4] This Court has held that the harmless error doctrine may be applicable to a *Sandstrom* error if the court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). A *Sandstrom* error can be harmless beyond a reasonable doubt under two circumstances: (1) where the faulty instruction applied to an element of the crime not at issue at the trial; or (2) where evidence of guilt was "overwhelming." *Davis*, 752 F.2d at 1521. In this second situation, the court's analysis should focus on whether evidence of the presumed element (i.e., intent), rather than the more inclusive issue of *guilt*, is overwhelming. *See Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

[5] Appellant's sole defense in the present case was that he lacked intent to defraud. He claimed that he did not pay the subcontractors because he was involved in contract disputes with them. The faulty instruction, which shifted the burden of proof on intent, thus applied to an element of the crime that was contested at trial. The State offered no evidence of intent to defraud, other than the evidence which gave rise to the presumption in the present case. Under these circumstances, the evidence of appellant's intent was far from overwhelming. We cannot conclude that, beyond a reasonable doubt, the *Sandstrom* violation did not contribute to the verdict obtained. The *Sandstrom* violation was therefore not harmless error.

II. Constitutionality of Fla.Stat. § 713.34(3)

[6] Appellant also challenges the constitutionality of Fla.Stat. § 713.34(3), both as applied to him and on its face. A statute that relieves the State of the affirmative burden of proving one of the elements of an offense is analyzed in accordance with the same principles as the jury instructions that are based on that statute. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[7] The Florida Supreme Court has held that Fla.Stat. § 713.34(3) creates a permissive inference, and not a mandatory rebuttable presumption. *Farrari*, 398 So.2d 804. Normally, a state supreme court is the ultimate expositor of state law. *Mullaney*, 421 U.S. at 691, 95 S.Ct. at 1886. However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts. We note that to hold otherwise would create the anomalous situation where a statute is held to be constitutional, although jury instructions that are merely a *verbatim* rendition of the statute are held to be unconstitutional.

[8] For the reasons discussed in the first part of this opinion, we conclude that Fla.Stat. § 713.34(3) creates a mandatory rebuttable presumption. We therefore hold that Fla.Stat. § 713.34(3) is unconstitutional both on its face and as applied to the defendant in the present case. *See Francis*, 105 S.Ct. at 1973.

The order of the district court denying appellant's Petition for Writ of Habeas Corpus is REVERSED.

SUPREME COURT OF THE UNITED STATES

C. L. NORVELL, SHERIFF, ST. LUCIE JAIL ET AL. *v.* RICHARD MILLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–1359. Decided May 19, 1986

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

THE CHIEF JUSTICE, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting from the denial of certiorari.

Miller was charged with "misapplication of funds" in connection with the 1978 construction of several homes. The Florida statute under which Miller was charged provides that one of the elements of the crime, the "intent to defraud," can be *prima facie* established by the "failure to pay for such labor, services or material furnished for the specific improvement after receipt of such proceeds." Fla. Stat. § 713.34(3).

The State trial court instructed the jury that:

> "Proof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Miller was found guilty and sentenced to six months in county jail and fourteen and one-half years' probation. After Miller's conviction was affirmed on direct appeal, he brought this federal habeas action. The District Court denied the application.

The Court of Appeals for the Eleventh Circuit reversed, holding that the jury instructions could have been inter-

preted as creating a "mandatory rebuttable presumption" in violation of *Francis* v. *Franklin*, 105 S. Ct. 1965 (1985), and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Although this holding was sufficient to dispose of the application, the court went on to hold that the statute under which Miller was convicted was unconstitutional. Since the improper jury instructions were a "verbatim" rendition of the statute, the court reasoned, the statute, like the instructions, must fail.

Even if the jury instructions were impermissible under *Franklin* and *Sandstrom*, by striking down the underlying statute the Court of Appeals decision flies in the face of *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979), where we considered a facial attack upon a New York statute on the grounds that it impermissibly shifted the burden of proof. As the Court explained, a facial attack to a statute on these grounds will fail if the statute creates only a "permissive inference," leaving the trier of fact free to credit or reject the inference. The application of the statute to a particular case, however, can be successfully challenged if there is no rational way the trier could make the connection permitted by the inference. On the other hand, a statute creating a "mandatory presumption" is "a far more troublesome evidentiary device" because it may "affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact." *Id.* at 157. To the extent that the trier of fact is forced to abide by the presumption irrespective of particular facts presented by the case, the analysis of the mandatory presumption's constitutional validity "is logically divorced from those facts and based on the presumption's accuracy in the run of cases." *Id.* at 159. Because the statute in *Ulster County* created only a permissive inference, the Court held that the Court of Appeals erred in passing on the constitutionality of the statute "on its face." *Id.* at 163.

The Court of Appeals' decision in this case striking down the statute cannot be reconciled with *Ulster County*. According to the Florida Supreme Court, the statute creates only a "permissive inference." *State* v. *Ferrari*, 398 So. 2d 804 (Fla. 1981). A state trial court could, consistently with the statute as interpreted by the Florida Supreme Court, instruct the jury that it is free to either accept or reject the inference; that is, from the evidence that a contractor received advance payment for a particular project and did not use the money for the project, the jury could *but need not* infer that the contractor intended to defraud the owner. As we held in *Ulster County*, whether this kind of permissive inference unconstitutionally relieves the State of its burden of proof is to be determined on the facts of each case. But, because such an inference can be applied in a manner not repugnant to the Constitution, the Court of Appeals had no warrant to hold the Florida statute unconstitutional.

The Court of Appeals suggested that, while the Florida Supreme Court said that the statute created only a permissive inference, as a matter of federal law it created a mandatory rebuttable presumption. The Florida Supreme Court, however, is the final expositor of Florida law, not the Eleventh Circuit Court of Appeals. Whether the troublesome phrase in the statute—"shall constitute prima facie evidence"—places the burden upon the defendant to rebut the State's showing is a question properly left to the Florida Supreme Court. Even if the Florida Supreme Court had not already declared that the statute created only a permissive inference, the Court of Appeals still should have allowed the Florida courts to interpret their statute to conform with federal constitutional requirements. And, even if the statute were incapable of such interpretation, the Florida courts should have been left free to make that determination in the first instance.

The holding of the Court of Appeals is not only incorrect but also completely gratuitous. After holding that the peti-

tion should be granted because of the flawed jury instruction, it had no reason to go on and take the drastic step of holding a state statute unconstitutional, thereby leaving the State with no means of retrying Miller. Accordingly, I would grant the petition and at least allow plenary consideration of the issue.